Supreme Court, U.S.
FILED

10-935 JAN 15 2011

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

KENNETH L. SMITH,
Petitioner,

v.

HON. CLARENCE THOMAS, *et al.*,
Respondents,

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia

Kenneth L. Smith,
in propria persona
23636 Genesee Village Rd.
Golden, Colorado 80401
(303) 526-5451

QUESTIONS PRESENTED

1. Can Congress (or this Court, acting *sua sponte*) impose restrictions upon the jurisdiction of Article III courts in such a way as to eviscerate the Bill of Rights?

2. Do lower federal courts have jurisdiction under the Declaratory Judgment Act, 28 U.S.C. §2201, sufficient to declare the Bill of Rights null and void for want of meaningful enforcement?

OTHER PARTIES TO THE PROCEEDING

The Respondents are initial defendants who participated in the appeal in the Court of Appeals for the District of Columbia: Chief Justice JOHN G. ROBERTS, JR, and Associate Justices CLARENCE THOMAS, ANTONIN G. SCALIA, ANTHONY M. KENNEDY, RUTH BADER GINSBURG, SAMUEL A. ALITO,, JR. STEPHEN G. BREYER, all of which **have been named** in this action **in their official capacities only**, thereby entitling them to hear this appeal. Justice JOHN PAUL STEVENS left the bench during the pendency of this matter; accordingly, any action taken with respect to him would by definition be moot. As the last document submitted in this case was filed before Associate Justice ELENA KAGAN ascended to the bench, she has yet to be joined in this appeal; a separate motion will be filed to facilitate this.

TABLE OF CONTENTS

QUESTIONS PRESENTED

OTHER PARTIES TO THE PROCEEDING

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF THE CASE 13

SUMMARY OF PERTINENT FACTS 19

REASONS FOR GRANTING REVIEW 24

I. The Federal Judge: Of Adam and Evil . . 27

II. Abe Lincoln's Simple Proof 44

CONCLUSION 52

EXHIBITS 57

TABLE OF CASES AND AUTHORITIES

CASE	PAGE
Board of County Commissioners v. Umbehr, 518 U.S. 668 (1996)	32
Bounds v. Smith, 430 U.S. 817 (1977)	14, 19
Bradley v. Fisher, 80 U.S. 335 (1871)	22, 40
Caperton v. A. T. Massey Coal Co, 129 S.Ct. 2252 (2009)	23
Carey v. Piphus, 435 U.S. 247 (1978)	13, 21
Claflin v. Houseman, 93 U.S. 130 (1876)	21
Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)	13
Cohens v. Virginia, 19 U.S. 264 (1821)	40
Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992)	41
Davidson Chevrolet v. City and County of Denver, 330 P.2d 1116 (Colo. 1958)	22
Diblasio v. Novello, 344 F.3d 292 (2d Cir. 2003)	20
Dist. of Columbia v. Heller, No. 07-290, 554 U.S. ___ (2008)	49
District of Columbia Ct. of Appeals v. Feldman, 460 U.S. 462 (1983)	20
Dr. Bonham's Case [1610] 77 Eng. Rep. 638 (C.P.)	21
Erbaugh v. People, 140 P. 188 (Colo. 1914)	22
Ex parte McCardle, 74 U.S. 506 (1869)	15
Ex parte Roe, 234 U.S. 70 (1914)	15
Georgia v. Brailsford, 3 U.S. 1 (1794)	36, 49
Hans v. Louisiana, 131 U.S. 1 (1890)	41

CASE **PAGE**

Heydon's Case [1584] 76 Eng. Rep. 637 (Exch.). 53
Hyde v. Stone, 61 U.S. 170 (1857) 17, 53
James B. Beam Distilling Co. v. Georgia,
501 U.S. 529 (1991) 31
Kamper v. Hawkins, 3 Va. 19 (Va. 1793) . . . 34, 35
Kawananakoa v. Polyblank,
205 U.S. 349 (1907) 40
Lake County v. Rollins, 130 U.S. 662 (1889) . . 14
Marbury v. Madison, 5 U.S. 137 (1803) . . . . various
Mondou v. New York, N.H. & H. R. Co.,
223 U. S. 1 (1912) . . . . . various
Moragne v. States Marine Lines,
398 U.S. 375 (1970) . . . . . various
Mosk v. Superior Court of Los Angeles,
601 P.2d 1030 (Cal. 1979) 22
Panko v. Rodak, 606 F.2d 168(7th Cir. 1979) . 13
Pierson v. Ray, 386 U.S. 547 (1967) 41
Roe v. Wade, 410 U.S. 113 (1973) 18
Scott v. Sandford, 60 U.S. 393 (1857) 36
Smith v. Arguello, No. 10-1280
(10th Cir. filed Jul. 2, 2010) 18
Smith v. Bender, No. 09-cv-1003 (10th Cir.
Sept. 11, 2009) (unpublished) . . . . . various
Smith v. Mullarkey, 67 F.App'x. 535
(10th Cir. Jun. 11, 2003) 19
Smith v. Mullarkey, 121 P.3d 890
(Colo. 2005) (per curiam) 20

CASE	PAGE
Smith v. Thomas, 09-1926-JDB (D.D.C. Jan. 21, 2010), *aff'd.*, No. 10-5041 (D.C. Cir. Jul. 1, 2010)	14
State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967)	41
State Oil Co. v. Khan, 522 U. S. 3 (1997)	31
Sullivan v. McDonald, 913 A.2d 403 (Conn. 2007)	22
Tumey v. Ohio, 273 U.S. 510 (1927)	13, 21
United States v. Bajakajian, 524 U.S. 321 (1998)	13
United States v. Callender, 25 F.Cas. 239 (D.Va. 1800)	38
United States v. Lee, 106 U.S. 196 (1882)	18
United States ex rel. Smith v. Anderson, No. 10-1012 (10th Cir. Jul. 27, 2010) (unpublished)	18, 41
United States v. Will, 449 U.S. 200 (1980)	22
United States v. Wiltberger, 18 U.S. 76 (1820)	14

CONSTITUTIONS AND STATUTES

	PAGE
18 U.S.C. § 241-42	19, 30
28 U.S.C. § 1361	13, 53
28 U.S.C. § 2201	14
Colo. Rev. Stat. § 13-4-101	22
Colo. Rev. Stat. § 13-4-102(1)	22
Colo. Rev. Stat. § 16-6-201(2)	22
Fed. R. Civ. P. 81	18
Mass. Const. Part I, Art. I	45
Va. Const. of 1776 (1830) § 3	45

OTHER AUTHORITIES

	PAGE
A Conversation with Justice Clarence Thomas, 36 *Imprimis* 10, Oct. 2007	44
Aquinas, St. Thomas, *De Regimine Principum* (1267)	45
Annals of Congress, Vol. 1 (1789)	51
Arnold, Richard S., Unpublished Opinions: A Comment, 1 J. App. Prac. & Process (1999)	30
Barnett, Randy E., *Scalia's Infidelity: A Critique of Faint-Hearted Originalism*, 75 U. Cin. L. Rev. 7 (2006)	44
Blackstone, William, *Commentaries on the Laws of England* (1765)	various

PAGE

Bork, Robert H., *Coercing Virtue: The Worldwide Rule of Judges* (AEI Press, 2003) . . 24
Burrows, Edwin G., "Patriots or Terrorists?," *American Heritage* (Fall 2008) 48
Coke, Edward, Institutes of the Laws of England (1644) 34
Declaration of Independence (U.S. 1776) 16, 47
Elliot, Jonathan, Debates on the Federal Constitution (1836) . . . . . various
Evangelium Vitae § 55, Encyclical Letter on the Value and Inviolability of Human Life (Mar. 25, 1995) 45
Evans, Charles, *Report Of the Trial Of the Hon. Samuel Chase* (1805) 38, 39
Farrand, Max, The Records of the Federal Convention of 1787 (1911) 51
Feinman, Jay M., and Cohen, Roy S., *Suing Judges: History and Theory*, 31 S.Car. L. Rev. 201 (1980) 40
Geyh, Charles, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 Ind. L.J. 153 (2003) 39
Gibbon, Edward, *The Decline and Fall of the Roman Empire* (ca. 1780) 17
Ginsburg, Ruth Bader, Nick News, *Nickelodeon* (interview broadcast Dec. 27, 1997) 30
Hall, David, Genevan Reform and the American Founding (Lexington Books 2003) 45

PAGE

Hawles, John, *The Englishman's Right: A Dialogue Between a Barrister At Law and a Juryman* (1680) 37
Hellman, Arthur D., *Case Selection in the Burger Court: A Preliminary Inquiry*, 60 Notre Dame L. Rev. 947 (1985) 23
Jackson, Andrew, Farewell Address (Mar. 4, 1837) 37
Jefferson, Thomas, Letter
-- (to Abigail Smith Adams), Sept. 11, 1804 . 43
-- (to Edmund Pendleton), Aug. 26, 1776 . . . 34
-- (to Isaac Tiffany), Apr 4, 1819 46
-- (to Wilson Nicholas), Sept. 7, 1803 33
-- (to William C. Jarvis), Sept. 28, 1820 36
Jefferson, Thomas, *Notes on the State of Virginia* (1785) 16, 49
John, Elton, *Mona Lisas and Mad Hatters* (MCA 1972) 23
Kagan, Elena, *Richard Posner, the Judge*, 120 Harv. L. Rev. 1121 (2007) 27
Kates, Don B., *The Right To Arms: The Criminology of Guns*, 2010 Cardozo L. Rev. 86 46
Kozinski, Alex, Letter (to Samuel A. Alito, Jr.), Jan. 16, 2004 28
Lincoln, Abraham, Speech (Springfield, IL), Oct. 16, 1854 52

PAGE

Long, Colleen, NYPD: 7 Gang Members Brutally Tortured Gay Recruit, *Associated Press*, Oct. 9, 2010 37
Locke, John, *Second Treatise of Civil Government* (1690) 48
Mauro, Tony, Difference of Opinion, *Legal Times*, Apr. 12, 2004 28
Milton, John, *Paradise Lost* (1667) 27
Obama, Barack, Speech (Tucson, AZ), Jan. 12, 2011 53
Posner, Richard A., *How Judges Think* (Harvard U. Pr. 2008) 27, 28
Murray, Frank J., Justices to Review Access to Opinions, *Wash. Times*, Oct. 27, 2000 . 28
Paine, Thomas Paine, *The American Crisis, No. 1* (Dec. 19, 1776) 46
Perfunctory Justice: Overloaded Federal Judges Increasingly Are Resorting to One-Word Rulings, *Des Moines Register*, Mar. 26, 1999 28
Pether, Penelope J., *Constitutional Solipsism: Toward a Thick Doctrine of Article III Duty; or Why the Federal Circuits' Nonprecedential Status Rules are (Profoundly) Unconstitutional*, 17 W.&M. Bill Rts. J. 955 (2009) ... 32
Richman, William M., and Reynolds, William L., *Elitism, Expediency, and the New* Certiorari: *Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273 (1996) 42

PAGE

Scalia, Antonin, God's Justice and Ours, *First Things* (May, 2002) 33
Scalia, Antonin, *"Historical Anomalies in Administrative Law,"* Supreme Court Historical Soc'y. (1985) 18, 40
Scalia, Antonin, On Constitutional Interpretation 29
Sobran, Joseph, How Tyranny Came to America, *Sobran's* (1994) 37
Stein, Sam, Kagan: In *Bush v. Gore*, Court Was Affected By Politics and Policy, *Huffington Post*, May 19, 2010 24
Stevens, John Paul, *"Two Questions About Justice,"* 2003 Ill. L. Rev. 821 41
Story, Joseph, *Commentaries On the Constitution of the United States* (1836) 26, 31
Suetonius, *The Lives of the Twelve Caesars* (trans. A. Thomson; Bell, 1893) 25
The Federalist (I. Kramnick ed. 1987) 33, 48
Wolfram, Charles , *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639 (1973) 51

OPINIONS BELOW

A copy of the unpublished opinion of the Court of Appeals for the District of Columbia is included in the Appendix to this Petition at p. __; a copy of the order entered in the United States District Court for the District of Columbia is at p. __. Requests for rehearing and hearing *en banc* were denied summarily and thus, omitted on grounds of relevance.

STATEMENT OF JURISDICTION

Jurisdiction exists pursuant to 28 U.S.C. §1254(1). Petitioner's timely-filed petition for rehearing en banc was denied on October 19, 2010; this petition is considered timely filed when mailed on or before January 18, 2011.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

Article III, section 1, of the Constitution states:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good

> Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

28 U.S.C. § 1361 provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. § 2201(a) provides, in pertinent part:

> In a case of actual controversy within its jurisdiction ... [irrelevant statutory exceptions elided], upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

Where rights begin, discretion ends.

Over the years, this Court has consistently recognized that federal litigants have certain rights, such as that to "equality before the law," *United States v. Bajakajian*, 524 U.S. 321, 338 (1998), to procedural due process, *Carey v. Piphus*, 435 U.S. 247 (1978), to have grievances heard by a fair and independent tribunal, *Tumey v. Ohio*, 273 U.S. 510, 523 (1927), and to rely on pronouncements of this and other courts as authoritative expositions of what "the law" is. *Moragne v. States Marine Lines*, 398 U.S. 375, 403 (1970). These rights are all "conferred, not by legislative grace, but by constitutional guarantee." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985) (internal quotation omitted).

As the victim of a flagrantly lawless decision at the appellate level, Petitioner filed a timely action in federal district court for the District of Columbia, alleging that the Justices of this Court owed him a legal duty to review that decision, and that he was legally entitled to an order compelling them to do so. 28 U.S.C § 1361. Read "literally, the language of § 1361 would allow a district court to issue mandamus directly against the Justices of the Supreme Court themselves." *Panko v. Rodak*, 606 F.2d 168, 171 & n. 6 (7th Cir. 1979), and when the text of a

statutory provision "is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument." *Lake County v. Rollins*, 130 U.S. 662, 670 (1889). Moreover, the case must be "a strong one indeed, which would justify a court in departing from the plain meaning of words ... in search of an intention which the words themselves did not suggest." *United States v. Wiltberger*, 18 U.S. 76, 96 (1820).

In the alternative, in reliance on the Declaratory Judgment Act, 28 U.S.C. § 2201, Petitioner asked the courts below to declare the Bill of Rights null and void for want of meaningful enforcement. The First and Fourteenth Amendments guarantee access to the courts that must be "adequate, effective, and meaningful," *Bounds v. Smith*, 430 U.S. 817, 822 (1977); *ad hoc, ex post facto* denials of jurisdiction in flagrant defiance of the hide-bound precedent of this Court do not satisfy this requirement.

In perfunctory rulings, the courts below declared that they did not have jurisdiction to compel this Court to hear Petitioner's claims, despite pellucid statutory language to the contrary. *Smith v. Thomas*, 09-1926-JDB (D.D.C. Jan. 21, 2010), *aff'd.*, No. 10-5041 (D.C. Cir. Jul. 1, 2010). In observing that it "seems axiomatic that a lower court may not order the judges of a higher court to take an action," *Id.* at 1, they forgot that while a mandamus cannot *control* a higher court's action, it can "compel an exercise of

existing jurisdiction." *Ex parte Roe*, 234 U.S. 70, 72 (1914). If, as Petitioner maintains, the Defendants have clear jurisdiction over the matter in question and therefore, owe him a legal duty, the appropriate remedy lies in mandamus. Conversely, if the Defendants do not owe him a duty to hear his petition, the District Court owed him a statutory duty to declare his rights under law and therefore, had indisputable jurisdiction to declare the Bill of Rights null and void for want of enforcement; the decision below was plain error, no matter how you slice it.

This is a matter of first impression in this Court, concerning issues of paramount importance not only to the Nation, but also this Court. If lower courts are no longer bound by its pronouncements, it has abdicated its authority to "declare what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), and the United States Reports has limited value even as birdcage liner.

The ultimate question this Court must answer is the one presaged in *Ex parte McCardle*, 74 U.S. 506 (1869): Can Congress (or this Court, acting *sua sponte*) impose restrictions upon the jurisdiction of Article III courts sufficient to eviscerate the Bill of Rights? The presumptive answer is no, as the Bill of Rights is a constitutional Decalogue, limiting the discretion of all public officials; abridgement of that limitation would constitute a fundamental breach of contract, reducing the Bill of Rights to confetti.

A. Summary Of the Argument

A right cannot exist in the absence of an effective remedy for its breach. Therefore, if we are to have a right, the government has a duty to provide a corresponding remedy. Chief Justice Marshall writes:

> The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.

Marbury v. Madison, 5 U.S. at 163.

Thomas Jefferson observed that a constitution is supposed to provide remedies for all injuries accruing from unlawful invasions of rights, so the people are never required to resort to a rebellion in order to secure them. Thomas Jefferson, *Notes on the State of Virginia* 255 (1785) (Query 13). As the citizen has a solemn duty to assassinate tyrants, *Declaration of Independence*, ¶ 2 (U.S. 1776), any public official who exercises tyrannical power over him may lawfully be assassinated. As the assassination of public officials is undesirable, the law must be read as not bestowing tyrannical powers, and providing remedies whenever an official abuses his or her lawful authority. Ergo, *certiorari* is unconstitutional.

***Certiorari* abrogates the most basic warranty of civil society: the right to equal justice under law.** As existence of jurisdiction "creates an implication of duty to exercise it," *Mondou v. New York, N.H. & H. R. Co.*, 223 U. S. 1, 58 (1912), and courts "are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends," *Hyde v. Stone*, 61 U.S. 170, 176 (1857), jurisdiction over a properly presented claim attempting to vindicate a citizen's right to equal justice under law is mandatory.

***Certiorari* is by definition tyrannical, converting legal duties into an orgy of naked discretion.** Under the current regime, any lower court decision, no matter how offensive to the Constitution, can be allowed to stand. As Edward Gibbon observed in his magnum opus on the Roman Empire, "the discretion of the judge is the first engine of tyranny." 4 E. Gibbon, *The Decline and Fall of the Roman Empire*, Part VII (ca. 1780).

***Certiorari* divests this Court of its constitutional authority to declare the law.** It reduces the United States Reports to mere birdcage liner; every judge in the land knows that this Court is too busy writing books or rubbing elbows with the Queen to bother enforcing their own decrees. Thus by default, *law* becomes whatever the local black-robed satrap says it is.

Mandamus "was historically a writ issued by the King's judges, on behalf of the King, to compel his officers throughout the country to perform their assigned functions." Antonin G. Scalia, "Historical Anomalies in Administrative Law," Supreme Court Historical Soc'y. (1985), *reprinted at* http://www-.supremecourthistory.org/04_library/subs_volumes/04_c19_i.html. While we have done away with the formality of writs, *see* Fed. R. Civ. P. 81, the essence remains: A citizen, as principal and co-sovereign of this Republic, has the right to compel his authorized agents to discharge any duties owed to him, be they humble janitors or high-and-mighty judges. *See United States v. Lee*, 106 U.S. 196, 220 (1882). To find otherwise is to declare that the Justices of this Court are above the law.

This dispute has not been mooted by the passage of time, as Petitioner has another matter before this Court, albeit in a relational capacity, *United States ex rel. Smith v. Anderson*, No. 10-837 (filed Dec. 21, 2010), and still another in the Tenth Circuit. *Smith v. Arguello*, No. 10-1280 (10th Cir. filed Jul. 2, 2010). In addition, if Petitioner is successful, the denial of *certiorari* in his original case is *coram non judice*, as the Court would have had no legal authority to issue it. Also, as it would otherwise be a classic example of a dispute "capable of repetition, yet evading review," *Roe v. Wade*, 410 U.S. 113, 125 (1973), and the impairment of Petitioner's reliance interest, *see, Moragne, supra*, is both current and ongoing.

STATEMENT OF PERTINENT FACTS

The Constitution guarantees access to the courts that must be "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. at 822. Petitioner has been systematically denied this right by lower court judges who, quite frankly, are trying to protect their colleagues and perquisites. This criminal conspiracy, 18 U.S.C. § 241-42, centers on wrongful denials of jurisdiction, in willful defiance of the Constitution and settled precedent of this Court.

Although it is unnecessary to recount every act taken in furtherance of the criminal conspiracy as alleged herein, two incidents must be brought to the attention of this Court. The first occurred some seven years ago, where the Tenth Circuit admitted in black and white that Petitioner

> filed a complaint in federal district court setting forth twenty claims for relief for alleged violations of federal law and of plaintiff's constitutional rights. *Plaintiff sought declarations that the Colorado bar admission process and certain admissions rules were unconstitutional...*

Smith v. Mullarkey, 67 F. App'x. 535, ___ (10th Cir. Jun. 11, 2003), slip op. at 4 (unpublished; emphasis added).

In this case, judicial analysis is so simple, a caveman could do it: If condition X (an applicant challenges the facial constitutionality of a bar admission rule) is true, then Y (a lower federal court must hear his claim. *District of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462, 482-83 (1983)). Condition X is true (a fact the Tenth Circuit panel admitted in the highlighted text). Therefore, Y (a lower federal court must hear that claim).

The second relevant incident is even more egregious. Petitioner filed a substantially identical pendent action in state court, asking for the declaratory judgment the kangaroo courts of the Tenth Circuit had wrongfully denied him, and naming the justices of the Colorado Supreme Court as defendants in tort.[1] Despite the obvious and acknowledged fact that the Justices were named as defendants, *Smith v. Mullarkey*, 121 P.3d 890, 891 & n. 1 (Colo. 2005) (per curiam), and in the face of a state statute expressly depriving them of jurisdiction, Colo. Rev. Stat. § 16-6-201(2), and in the face of Petitioner's timely objections, they purported to decide the appeal, anyway.

---

[1] Specifically, Petitioner alleged an array of civil rights and Americans With Disabilities Act violations, under a theory of law which proved successful under legally indistinguishable facts in the Second Circuit *Diblasio v Novello*, 344 F 3d 292 (2d Cir 2003)

In a breathtakingly self-serving ruling, the Colorado Supreme Court declared that state courts had no jurisdiction to hear Petitioner's claims—in open and notorious defiance of a decision of this Court, as old as the state itself, that civil rights claims may be decided in state courts of general jurisdiction. *Claflin v. Houseman*, 93 U.S. 130 (1876). **So here, we are left with a fundamental absurdity: while Petitioner has a statutory right to have his claim heard, neither federal nor state courts will hear his claim.**

It has been black-letter law since the first English settlers arrived in Jamestown that a judge may not sit in judgment of his own cause. *Dr. Bonham's Case* [1610] 77 Eng. Rep. 638 (C.P.); *Tumey v. Ohio*, 273 U.S. at 523. In reliance on this Court's clear and unequivocal declarations that the Fourteenth Amendment does not permit state judges to decide matters in which they have a material financial interest, Petitioner again filed suit in federal district court, in a case styled *Smith v. Bender*, No. 07-cv-1924-MSK-KMT.

Again, the legal analysis is so simple, even a Harvard man could do it. All Petitioner needed to do is prove that he had a federal right to have his grievances heard by a fair and independent tribunal, and that he was deprived of it by a person acting under color of law. *Carey v. Piphus*, *supra*. But in what could only be described as a brazen

attempt to shelter wayward colleagues from ruinous tort liability, *see, Bradley v. Fisher,* 80 U.S. 335, 352-53 (1871),[2] the kangaroo courts of the Tenth Circuit issued an inexplicable ruling claiming that they "didn't have jurisdiction" over a federal civil rights claim. *Smith v. Bender*, No. 09-1003 (10th Cir. Sept. 11, 2009) (unpublished).

---

[2] *Bradley* establishes the outer bounds of judicial immunity, holding that it is only available to judges acting within the scope of their jurisdiction In *Smith v. Bender*, the justices were not within this safe harbor. "Any judge who knows of circumstances which shall disqualify him in a case shall, on his own motion, disqualify himself." Colo Rev Stat. § 16-6-201(2) Once a judge is obliged to recuse, he immediately loses all jurisdiction except to transfer the case, *Erbaugh v. People*, 140 P 188, 190 (Colo 1914), a judgment rendered in the face of a jurisdictional defect is void as a matter of law *Davidson Chevrolet v City and County of Denver*, 330 P 2d 1116 (Colo 1958)

Judges of the Colorado Court of Appeals may "serve in any state court with full authority as provided by law, when called upon to do so by the chief justice of the supreme court." Colo Rev Stat § 13-4-101 As the "Rule of Necessity" only applies in cases of actual necessity, see *United States v. Will*, 449 U S 200, 214 (1980) and sixteen non-conflicted judges were available and authorized by statute to hear the appeal, there was no "necessity" In every jurisdiction with a provision similar to Sec. 13-4-101, conflicted supreme court justices are required to recuse *E g., Mosk v Superior Court of Los Angeles*, 601 P 2d 1030 (Cal 1979) (collecting cases), *Sullivan v. McDonald*, 913 A.2d 403 (Conn. 2007) Besides, as a matter of Colorado statutory law, Petitioner's appeal should have been decided by the Colorado Court of Appeals, in any event Colo Rev Stat § 13-4-102(1)

Petitioner applied for *certiorari* and was denied review in the first two cases, despite raising matters never before heard in this Court (*e.g.*, whether the International Covenant on Civil and Political Rights trumps the judge-made law of immunity), because this Court is loath to hear the pleas of the common man.[3] Knowing this, Petitioner filed suit in the District Court for the District of Columbia for mandamus relief, in an attempt to compel the Justices to do their constitutional duty.

---

[3] As Elton John sang, "Rich man can ride, but the hobo, he can drown." Elton John, *Mona Lisas and Mad Hatters* (MCA 1972). *Cf. e.g., Caperton v. A. T. Massey Coal Co.*, No. 08-22 (U.S. Jun. 9, 2009) (rich man represented by former Solicitor General Ted Olson got review), *Smith v. Bender, supra* (poor man forced to represent himself out of necessity did not). As Professor Arthur Hellman observes,

> during the four Terms 1980-1983, only 2 pro se petitions were granted, and neither was a typical example of the genre. In one, a federal court of appeals had held a state statute unconstitutional, and the case fell within the Supreme Court's obligatory jurisdiction. In the other, **the petitioner was a member of the state supreme court's committee on bar admissions who was named as a defendant in an antitrust suit brought by an unsuccessful applicant.**

Arthur D. Hellman, *Case Selection in the Burger Court: A Preliminary Inquiry*, 60 Notre Dame L. Rev. 947, 964-65 (1985) (footnotes omitted, emphasis added). *Hoi polloi* need not apply.

REASONS FOR GRANTING REVIEW

This is the most important petition this Court will see in our lifetimes, as it will establish whether we still live in a Republic governed by the rule of law, or a regime, governed by a judicial oligarchy, imposed via "judicial *coup d'êtat*." Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* 13 (AEI Press, 2003).

While still a civilian, Justice Kagan summarized the problem this action strives to address: **Federal inferior court judges have appointed themselves absolute dictators,**[4] dispensing their own personal brand of *ex post facto* "justice" on an *ad hoc* basis—without respect for the Constitution, our law, or the precedents of this Court. It was a palace coup, made possible by this Court's sloth and indolence. Declaring what the law is and then neglecting to enforce it is kind of like defecating and forgetting to wipe your bum: the end product has a tendency to *smell*.

In the abstract sense, the most important right impaired by this practice is our right to rely on the plain text of the Constitution, statutory law, and binding court precedent as authoritative statements

---

[4] Justice Kagan used "Platonic Guardians," ignoring the fact that "benevolent dictators" exist only in Aristotlean theory Sam Stein, Kagan. In *Bush v Gore*, Court Was Affected By Politics and Policy, *Huffington Post*, May 19, 2010

of what "the law" is—offering "a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise." *Moragne*, 398 U.S. at 403. Without it, America is indistinguishable from the regime of the Emperor Caligula, where law was routinely applied on an *ad hoc* and *ex post facto* basis.[5] As Professor Story explains, the doctrine of *stare decisis* is the *sine qua non* of 'a government of laws, not men':

> The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them, when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, and our property. It is on this

---

[5] As Suetonius records, Caligula imposed taxes on food, lawsuits, and wages, but did not publish his tax laws, as a result,

> great grievances were experienced from the want of sufficient knowledge of the law At length, on the urgent demands of the Roman people, he published a law, but it was written in a very small hand, so that no one could make a copy of it

Suetonius, The Lives of the Twelve Caesars 280 (trans A Thomson, Bell, 1893), Ch 4, § LXI

> account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice or will of judges. A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.

3 J. Story, *Commentaries On the Constitution of the United States* § 377 (1836).

The discipline of mandatory review of all cases by the Nation's highest court, precipitating published decisions which become the law of the land, ensures equal justice under law. Conversely, when inferior courts are at liberty to disregard the law of the land, burying great caches of radioactive judicial waste in the Yucca Mountain of non-publication, "law" as we know it ceases to exist. This is why *certiorari* review is repugnant to the Constitution: It enables federal judges to play God, dispensing ersatz *ad hoc, ex post facto* 'justice' in open defiance of the very Constitution which forms the source of their power.

I. THE FEDERAL JUDGE: OF ADAM AND EVIL.

So spake the Fiend, and with necessity,
The Tyrant's plea, excused his devilish deeds.[6]

A. The Fig Leaf: Sign of Judicial Dishonesty

We all remember the tale of Adam and Eve in the Garden: They partook of the forbidden tree of knowledge—and learned that they were naked. And they were ashamed. So, what did they do? They instinctively reached for the primordial equivalent of towels: a fig leaf.

The sainted Judge Richard Posner, whom Justice Kagan once lauded as the "the most important legal thinker of our time," Elena Kagan, *Richard Posner, the Judge*, 120 Harv. L. Rev. 1121, 1121 (2007), uses this analogy to explain the oft-grotesque battlefield triage we see in America's federal courts. Admitting the patently obvious, Posner asserts that appellate judges frequently take indecent liberties with both facts and precedent in an often-transparent effort to hide the fact that they are not so much interpreting the law as they are writing it to suit their personal preferences. Richard A. Posner, *How Judges Think* 144 (Harv. U. Press 2008). They "are constantly

---

[6] John Milton, *Paradise Lost*, Vol 4, ln 393-94 (1667)

digging for quotations from and citations to previous cases to create a sense of inevitability about positions that they are in fact adopting on grounds other than deference to precedent," a process he characterized as "fig-leafing." Posner, id. at 350.

Even these juridicial abortions are literary masterpieces, when compared to the typical unpublished opinion. These days, Article III judges rarely bother to even *read* most of the opinions "they" hand down. E.g., Alex Kozinski (Chief Judge, Ninth Circuit), Letter (to Samuel A. Alito, Jr.), Jan. 16, 2004 at 5 (Ninth Circuit panels routinely issue 150 rulings per three-day session); Perfunctory Justice: Overloaded Federal Judges Increasingly Are Resorting to One-Word Rulings, *Des Moines Register*, Mar. 26, 1999, at 12 (fifty federal appeals decided in two hours in Eighth Circuit, per the late Judge Richard Arnold). Our courts' work product is so uniformly abysmal that Judge Kozinski described it as "sausage," unfit for human consumption. Tony Mauro, Difference of Opinion, *Legal Times*, Apr. 12, 2004.

Federal judges know that what they are doing is wrong. And like all tyrants, they invoke the mantra of "necessity." Justice Kennedy is claimed to have responded angrily to a vigorous critic of institutionalized nonpublication: "If you guys want us to do it right, we'd need 1,000 more judges." Frank J. Murray, Justices to Review Access to Opinions, *Wash. Times*, Oct. 27, 2000, at A8. *And the problem is?*

Yes, Justice Kennedy, we really do want you to finally do it right for a change. Justice Scalia is, in Petitioner's admittedly personal estimation, one of the ten brightest men to ever grace this Court. But what earthly good is all that intellectual firepower, when 99.44% of this Court's decisions are made by a single 25-year-old law clerk? And what is left of the reason of the law, when the only "answer" this Court has to give is "You lose!"

If a thousand or even ten thousand new federal judges are needed to get the job done right, then we need them. Of course, it will mean that the next Clarence Thomas won't be offered a seven-figure advance for embarrassing acts of self-aggrandizement like the execrable *My Grandfather's Son*, and Justice Kennedy would no longer be the *de facto* Supreme Court.[7] But the American people would be the real winners: they could once again declare, as Patrick Henry proudly proclaimed, that we have no king but the law.

---

[7] There is no discernible reason why we couldn't appoint even ninety-nine Justices to the Court. After all, the Ninth Circuit gets along fine with some fifty judges. Confirmation hearings would be less contentious, as panels would be selected at random, an individual Justice could do less damage. *See*, Antonin Scalia, *On Constitutional Interpretation* (audiotape on file, discussion at ~35 minutes).

B. Our Courts Have Usurped Powers Which Cannot Fairly Be Described as "Judicial."

"We would have chaos and not the rule of law if each judge in the land did simply what he or she thought was right instead of what the law requires." Ruth Bader Ginsburg, Nick News, *Nickelodeon* (broadcast Dec. 27, 1997). Not only is it a recipe for chaos, it is often a felonious violation of federal civil rights law. 18 U.S.C. § 241-42. The late Judge Richard Arnold explains:

> Article III [judges] . . . can exercise no power that is not "judicial." That is all the power that we have. When a governmental official, judge or not, acts contrary to what was done on a previous day, without giving reasons, and perhaps for no reason other than a change of mind, can the power that is being exercised properly be called "judicial"? Is it not more like legislative power, which can be exercised whenever the legislator thinks best, and without regard to prior decisions?

Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219, 226 (1999).

This isn't a tenet of rabid Islam, or even radical jurisprudence. Justice Scalia is in complete agreement with Judge Arnold's sentiment:

> "The judicial power of the United States" conferred upon this Court and such inferior courts as Congress may establish, Art. III, § 1, must be deemed to be the judicial power as understood by our common-law tradition. That is the power "to say what the law is," not the power to change it.

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 544, 549 (1991) (Scalia, J., concurring; citation omitted), *accord*, Story, *Commentaries at* § 378.

Technically, it still remains the Supreme Court's "prerogative alone to overrule one of its precedents," *State Oil Co. v. Khan*, 522 U. S. 3, 20 (1997), but as a practical matter, federal courts routinely use the United States Reports as a birdcage liner, as they know that they can disregard it with impunity. The result is a form of constitutional triage, where the rule of law is supplanted by the arbitrary and capricious rule of arrogant men. Professor Penelope Pether writes:

> Although litigants have appeals as of right to the federal courts of appeals, what happens in a **wrongly or sloppily or unsafely or arbitrarily decided case is effectively a *certiorari* decision masquerading as an appeal as of right** based on the applicable standard of review. Many of these cases cluster in areas where deep-seated sociolegal problems pro-

> duce high rates of appeals, where the government is the target of the lawsuit, and the paradigmatic governmental response ... is to jurisdiction strip ... [to employ] disciplinary mechanisms to encourage [judges] to decide against litigants, and to impose penalties that are designed to discourage appeals.

Penelope J. Pether, *Constitutional Solipsism: Toward a Thick Doctrine of Article III Duty; or Why the Federal Circuits' Nonprecedential Status Rules are (Profoundly) Unconstitutional*, 17 W.&M. Bill Rts. J. 955, 977 (2009).

A seriatim listing of judicial transgressions would readily consume this brief a dozen times over, but this will come as no surprise to Justice Scalia, who sees our courts as "designing a Constitution for a country I do not recognize." *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting). *Petitioner feels his pain.*

C. The Framers Were Unwilling To Entrust Federal Judges With Any Real Power.

At the risk of stating the painfully obvious, there is one and only one correct way to interpret the Constitution, and the most effective summation of this principle comes (as it always appears to) from the pen of Thomas Jefferson:

> Our peculiar security is in possession of a written constitution. Let us not make it a blank paper by construction. If [our public officials' powers are boundless] then we have no constitution. If it has bounds, they can be no other than the definition of the powers which that instrument gives.

Thomas Jefferson, Letter (to Wilson Nicholas), Sept. 7, 1803 at 2. As Justice Scalia so adroitly put it, "the Constitution that I interpret and apply is not living but dead—or, as I prefer to put it, enduring. It means today not what current society (much less the Court) thinks it ought to mean, but what it meant when it was adopted." Antonin Scalia, God's Justice and Ours, *First Things* (May, 2002) at 17.

Article III of that Constitution entrusted federal judges with the judicial Power—words that actually had meaning. The Framers envisioned judges as interpreters of the law, as opposed to its authors. Alexander Hamilton explained that, to "avoid an arbitrary discretion in the courts, it is indispensable that [our judges] should be bound by strict rules and precedents, which serve to define and point out their duty in every particular case before them." The Federalist No. 78, at 470 (I. Kramnick ed. 1987) (A. Hamilton). A century earlier, Lord Coke wrote that "[i]t is the function of a judge not to make, but to declare the law, according to the golden mete-wand of the law and not by the crooked cord of discretion."

1 E. Coke, *Institutes of the Lawes of England* 51 (1642). Jefferson crystallizes the thought with his usual brilliance: "Let the judge be a mere machine." Thomas Jefferson, Letter (to Edmund Pendleton), Aug. 26, 1776.

Common law judges in the eighteenth century were scarcely more than administrators and father-confessors. While they ruled on the admissibility of evidence, all the real power rested with the jury. More importantly, the judges of the day understood and respected the limitations of their authority. Presided over by such notables as St. George Tucker, *Kamper v. Hawkins*, 3 Va. 19 (Va. 1793), was the state-law precursor to *Marbury v. Madison*. It was Judge Tucker's view that the judge may not stray beyond the narrowly-circumscribed bounds of his office:

> If the principles of our government have established the judiciary as a barrier against the possible usurpation, or abuse of power in the other departments, how easily may that principle be evaded by converting our courts into legislative, instead of constitutional tribunals?
>
> To preserve this principle in its full vigour, it is necessary that the constitutional courts should all be restrained within those limits which the constitution itself seems to have

assigned to them respectively.

Id., 3 Va. at 88 (opinion of Tucker, J., seriatim). Judge Tyler apprehended the danger equally, in observing that "I will not in an extra-judicial manner assume the right to negative a law, for this would be as dangerous as the example before us." Id. at 61 (opinion of Tyler, J., seriatim).

Even in the rarefied air of the United States Supreme Court, the jury was the ultimate master of both fact and law. Speaking for the Court in a civil matter, Chief Justice Jay gave the following charge to a jury sitting in a case of original jurisdiction before this august body:

> It may not be amiss, here, Gentlemen, to remind you of the good old rule that on questions of fact, it is the province of the jury; on questions of law it is the province of the court to decide. But it must be observed that by the same law which recognizes this reasonable distribution of jurisdiction, you have nevertheless **a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy**. On this and on every other occasion, however, we have no doubt you will pay that respect which is due to the opinion of the court: for, as on the one hand, it is presumed, that juries are the best judges of facts, it is, on the other

> hand, presumable that the court is the best judge of law. **But still both objects are lawfully, within your power of decision.**

Georgia v. Brailsford, 3 U.S. 1, 4 (1793) (emphasis added).[8] Courts of justice had a duty "to declare all acts contrary to the manifest tenor of the Constitution void," The Federalist No. 78, at 438 (A. Hamilton), but whether their declarations were to be acted upon was the jury's prerogative. Judges were merely advisors, trusted specifically because they had no power to speak of.

In the Founders' considered view, handing real power to the judiciary was almost certain to result in tyranny. According to Senator Richard Henry Lee, fourth President of our Continental Congress, the singular virtue of the jury trial is that it offered the public protection from corrupt and aristocratic judges. 1 Elliot, *Debates on the Federal Constitution* 505 (1836) (remarks of Mr. Lee, of Virginia). Jefferson concurred, writing that to anoint judges as ultimate arbiters of constitutional questions was "a very dangerous doctrine indeed, and one which would place us under the despotism of an Oligarchy." Thomas Jefferson, Letter (to William C.

---

[8] While the *Marbury* Court claimed a nominal right to judicial review, in the first three-score years of our Republic, it never once invalidated a federal statute, ending with *Scott v Sandford*, 60 U.S 393 (1857) (Missouri Compromise)

Jarvis), Sept. 28, 1820, at 1. No one was prepared to entrust judges with power, on either side of the Pond. *E.g.*, John Hawles, *The Englishman's Right: A Dialogue Between a Barrister At Law and a Juryman* 72 (1844 ed.) (1680) ("less danger will arise from the mistakes of jurymen, than from the corruption of judges").

D. Federal Judges Have Methodically Disabled Every Structural Check Upon Their Power Built Into the Constitution.

As the late, great paleoconservative wordsmith Joe Sobran puts it, "the U.S. Constitution poses no serious threat to our form of government." Joseph Sobran, How Tyranny Came to America, *Sobran's* (newsletter) 1994. Tyranny came as it always does: with a whisper. Eternal vigilance "is the price of liberty," Andrew Jackson, *Farewell Address*, Mar. 4, 1837; 'Lady Liberty' has been found comatose, if not yet as dead as Terri Schiavo. Generations of federal judges have systematically beaten, gang-raped and sodomized her to the point where she was unrecognizable. "These suspects employed terrible wolf-pack odds of nine-against-one, odds which revealed them as predators whose crimes were as cowardly as they were despicable." Colleen Long, NYPD: 7 Gang Members Brutally Tortured Gay Recruit, *Associated Press*, Oct. 9, 2010.

The initial mile-marker on this road to perdition was an obscure case styled *United States v. Callender*, 25 F.Cas. 239 (D.Va. 1800), presided over by Justice Chase while riding circuit. The rationale Chase gave for taking the power to decide the constitutionality of a statute away from the jury is the principle Petitioner seeks to vindicate in this Court:

> It must be evident, that decisions in the district or circuit courts of the United States will be uniform, or they will become so by the revision and correction of the supreme court; and thereby the same principles will pervade all the Union; but the opinions of petit juries will very probably be different in different states.

Id., 25 F.Cas. at 257.

Justice Chase was never able to explain why unelected federal judges could be trusted to honor their oaths, whereas civil jurors who had no vested interest in the outcome of the case and took similar oaths could not. This was underscored by the historical irony that Chase was impeached for his conduct in that trial, described as "marked ... by manifest injustice, partiality, and intemperance." Articles of Impeachment Against Samuel Chase, Art. IV, as reprinted in, Charles Evans, Report Of the Trial Of the Hon. Samuel Chase (1805), Appendix at 4.

Though few realized it at the time, Chase dealt a mortal blow to the Constitution, by upsetting its delicate balance of powers. Judges were free to substitute the crooked cord of their own discretion for the golden mete-wand of the law. And in a fit of irony, he delivered its epitaph:

> Where law is uncertain, partial, or arbitrary; where justice is not impartially administered to all; where property is insecure, and the person is liable to insult and violence, without redress by law, the people are not free, whatever may be their form of government.

Samuel Chase, Grand Jury Instructions (manuscript), May 2, 1803, reprinted in Charles Evans, *Report Of the Trial Of the Hon. Samuel Chase* 60 (1805).

Once this mortal blow was struck, Lady Liberty's demise became inevitable. Having gotten the jury out of the way, Chief Justice Marshall established the doctrine of judicial supremacy in *Marbury v. Madison, supra*. Congress impeached Chase for his transgressions, but that body was just as feckless then as it is now; their failure to convict set the precedent that no judge would ever be impeached for his high-handed decision-making alone. Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 Ind. L.J.

153, 169 (2003). As Judge Bork observes, it was a bloodless coup.

Having seized dictatorial power, federal judges methodically went about the business of consolidating it. Obviously, the first order of business was eliminating the traditional common law liability in tort for judges, *Bradley v. Fisher*, 80 U.S. at 354; cf., Jay M. Feinman and Roy S. Cohn, *Suing Judges: History and Theory*, 31 S. Car. L. Rev. 201, 201-10 (1980) (default rule: judges could be sued for cause). Second was eradicating the right of a justly-aggrieved citizen to sue the federal government in *respondeat superior* for even criminal acts committed on the bench, *Kawananakoa v. Polyblank*, 205 U.S. 349 (1907); *see, Cohens v. Virginia*, 19 U.S. 264, 411-12 (1821) (dictum); as this removes any incentive other branches of government might find to deter federal judges' abuse of their Article III authority.[9]

Not even the Constitution itself was safe from our judges' depredations: They even re-wrote the

---

[9]Albeit not speaking *ex cathedra*, Justice Scalia observed that domestic sovereign immunity was not a part of the English common law known to the Framers. He went on to observe that the rule was "unthinkingly" applied in *Cohens*, and particularly absurd when invoked in actions lying in mandamus or prohibition. Antonin Scalia, "Historical Anomalies, *supra*

Eleventh Amendment to suit their liking. *Hans v Louisiana*, 134 U.S. 1 (1890) (in effect, creation of a second Eleventh Amendment; *see e.g.*, John Paul Stevens, *"Two Questions About Justice,"* 2003 Ill. L. Rev. 821). Likewise, in declaring that the "any person" of the ubiquitous Section 1983 really meant "any person but us judges," *Pierson v. Ray*, 386 U.S. 547 (1967). the Court laid waste to a vast array of time-honored canons of statutory construction, including the "plain meaning" rule, *see, Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (collecting cases), reliance on legislative history when a statute is unclear, and the principle that remedial statutes are liberally construed, a rule it relied upon literally one day earlier in *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523 (1967).

Unsurprisingly, every constitutional constraint on arbitrary judicial action was interpreted into oblivion. The Good Behavior Clause was denuded of meaning, the common law right to private prosecution of public officials who committed crimes against you was annulled, and relief in the nature of mandamus has been downgraded from a right to a privilege. *United States ex rel. Smith v. Anderson*, *supra*. According to Professors Richman and Reynolds, for an average citizen, intermediate appellate review is *de facto certiorari* review:

> [T]he courts have abandoned the notion of one appellate method for all cases and all litigants. The significant cases, those brought by wealthy, powerful, or institutional litigants—receive the traditional approach model. The routine, trivial cases—usually the ones brought by poorer, weaker litigants—are relegated to two-track appellate justice. **For these cases (about half the total) the circuit courts have become certiorari courts, rather than courts of mandatory, appellate jurisdiction that Congress intended.**

William M. Richman and William L. Reynolds, *Elitism, Expediency, and the New* Certiorari: *Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273, ___ (1996) (emphasis added).

E. The Judicial Usurpation of Dictatorial Power Was Predictable ... and Predicted.

Legend has it that, at the close of the Constitutional Convention in Philadelphia on September 18, 1787, a Mrs. Powel stood outside the door, anxiously awaiting the results. When Benjamin Franklin emerged, she asked him directly: "Well Doctor, what have we got, a republic or a monarchy?" "A republic, if you can keep it," responded Franklin.

The Framers were practical men, who understood human nature on a visceral level. Thomas Jefferson

quite accurately predicted that federal judges would eventually become despots. In a letter to Abigail Adams, he observed that

> the opinion which gives to the judges the right to decide what laws are constitutional and what not, not only for themselves in their own sphere of action but for the Legislature and Executive also in their spheres [*Marbury v. Madison, supra*], would make the Judiciary a despotic branch.

Thomas Jefferson, Letter (to Abigail Smith Adams), Sept. 11, 1804, at 2. Having usurped the authority properly vested in the people by virtue of preservation of the right to a jury trial, our judiciary plucked the apple of absolute power from the Tree of Life ... *and it was not good.*

II. ABE LINCOLN'S SIMPLE PROOF

As enamored as Petitioner is with the originalism of Justice Scalia,[10] Justice Thomas was chosen as lead Defendant because he knows what is wrong and presumably, how to fix it. By his own admission, it is a major theme of his life's work on the bench. As he observes, the structure of our Constitution and Bill of Rights is the most certain protector of our rights as individuals:

> We should always start, when we read the Constitution, by reading the Declaration [of Independence], because it gives us the reasons why the structure of the Constitution was designed the way it was. And with the Constitution, it was the structure of the government that was supposed to protect our liberty. And what has happened through the years is that the protections afforded by that structure have been dissipated. So my opinions are often about the undermining of those structural protections.

A Conversation with Justice Clarence Thomas, 36 *Imprimis* Vol. 10 (Oct. 2007) at 6 (emphasis added).

---

[10] Unfortunately, Justice Scalia is as faithful to his originalism as Tiger Woods was to his ex-wife Elin. See, Randy E. Barnett, *Scalia's Infidelity: A Critique of Faint-Hearted Originalism*, 75 U. Cin. L. Rev. 7, 13 (2006).

A. *Sic Semper Tyrannis* (Thus Always to Tyrants)

Our Founding Fathers maintained that the right to kill a tyrant was absolute. Thomas Jefferson and Benjamin Franklin both recommended that the Great Seal of the United States be encircled by the phrase, "Rebellion against Tyrants Is Obedience to God." David Hall, *Genevan Reform and the American Founding* 8 (Lexington Books 2003). Their sentiment has been endorsed by both a current and future saint, Thomas Aquinas, *De Regimine Principum*, reprinted in St. Thomas Aquinas: Political Writings 15 (R. Dyson trans., Cambridge U. Press 2002) (1267); *Evangelium Vitae* § 55, Encyclical Letter on the Value and Inviolability of Human Life (Mar. 25, 1995) (Pope John Paul II), and incorporated into state bills of rights. E.g., Mass. Const. Part I, Art. I; Va. Const. of 1776 (1830) §3.

Our Founding Fathers' concurrences resemble a Brandeis brief. Judge Roger Sherman—the only man to sign all four of our nation's founding documents—observed in the halls of Congress that it is "the privilege of every citizen, and one of his most essential rights, to bear arms, and to resist every attack upon his liberty or property, by whomsoever made." Don B. Kates, The Right To Arms: The Criminology of Guns, 2010 Cardozo L. Rev. 86, 98 & n. 41 (internal citation omitted); *see also, e.g.*, Thomas Jefferson, Letter (to Isaac Tiffany), Apr. 4, 1819, at 1, 3 Elliot, *Debates* at 45 (Speech of Patrick Henry, Virginia Convention, Jun 5, 1788). But their essence is perhaps best conveyed through the uncommon eloquence of Thomas Paine:

> Not all the treasures of the world, so far as I believe, could have induced me to support an offensive war, for I think it murder; but if a thief breaks into my house, burns and destroys my property, and kills or threatens to kill me, or those that are in it, and to *"bind me in all cases whatsoever"* to his absolute will, am I to suffer it? What signifies it to me, whether he who does it is a king or a common man?

Thomas Paine, *The American Crisis, No. 1* (Dec. 19, 1776), as reprinted in *Paine: Collected Writings* 97 (E. Foner, ed.) (Putnam, 1984).

Thomas Jefferson raised the ante, declaring that armed resistance was not merely a right, but a duty owed to one's fellow citizens. In what might be the most important sentence ever written, he proclaims that

> when a long train of abuses and usurpations, pursuing invariably the same object evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security.

Declaration of Independence at ¶ 2.

B. The Framers' Antidote To Tyranny: Separation of Powers

As the citizen has both a legal right and a civic duty to assassinate tyrants, id., it logically follows that a public official who exercises tyrannical power over him may lawfully be assassinated. John Locke explains:

> Where-ever law ends, tyranny begins, if the law be transgressed to another's harm; and whosoever in authority exceeds the power given him by the law, and makes use of the force he has under his command, to compass that upon the subject, which the law allows not, ceases in that to be a magistrate; and,

> acting without authority, may be opposed, as any other man, who by force invades the right of another.

John Locke, *Second Treatise of Civil Government* § 202 (1690). Just as the cop who rapes a stranded motorist cannot claim that his position authorized him to do so, judges who gang-rape the Constitution cannot claim that *their* acts are authorized. Alexander Hamilton voices concurrence:

> There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. ... To deny this, would be to affirm ... that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

The Federalist No. 78 at 438 (Alexander Hamilton).

Having lost 25,000 of their comrades[11] in the fight for independence—proportionally, the equivalent of the Denver metropolitan area—the Framers under-

---

[11] The precise number is unknown, as many as 18,000 are thought to have perished while being held as prisoners Edwin G Burrows, "Patriots or Terrorists?," *American Heritage*, Fall 2008, reprinted at http //www americanheritage.com/articles-/magazine/ah/2008/5/2008_5_54 shtml.

stood on a visceral level that revolution is a bloody business, and one to be avoided. Their solution was a constitution, intended to provide remedies for all injuries accruing from unlawful invasions of rights, so the people are never required to resort to rebellion in order to secure them. Thomas Jefferson, *Notes on the State of Virginia* at 255. To that end, the Framers sought to duplicate the common law system of England, under which, "it is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded." 3 Blackstone, *Commentaries* at 23.

The Framers' theory of government, inspired in large part by Locke, Montesquieu, and Jefferson, was that if societal power was diffused, no one man or small cadre of men could accumulate enough of it to become a tyrant. While the three formal branches of government were entrusted with roughly equivalent power, the people, retaining their sovereignty as tenants-in-common, held superintending control over the government as a whole. They reserved the right to bear arms, on the theory that an armed populace would be "better able to resist tyranny." *District of Columbia v. Heller*, No. 07-2901, 554 U.S. ___ (2008), slip op. at 25. They retained the right to speak freely on public issues of the day, to vote for their representatives, and to decide the fate of their fellowmen from the jury box. *See, Georgia v. Brailsford, supra*.

C. Would Any Reasonable Person Agree To the Constitution As Interpreted By This Court?

From the days of grammar school, we are taught to admire and revere the United States Constitution as one of mankind's noblest achievements. Thus, it might seem odd to us that a surprisingly large number of Americans were opposed to its enactment. In fact, its proponents had to persuade their fellows to support it, which was the entire purpose of the Federalist Papers.

The Constitution and Bill of Rights should be read *in pari materia*, for without the latter, the former would not exist. Many States conditioned their ratification of the Constitution on the passage of an adequate bill of rights; the North Carolina Ratification Convention declined to ratify by roughly a 2/3 margin without it. 3 J. Elliot, *Debates* at 250-51.

James Madison was a Federalist, who contended that a Bill of Rights was not only unnecessary, but potentially harmful. Despite this, or maybe because of it, he was chosen to draft one. In introduction of his initial draft in the House of Representatives, he expressed his belief

> that the great mass of the people who opposed [the Constitution], disliked it because it did not contain effectual provisions against

> encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercised the sovereign power: nor ought we to consider them safe, while a great number of our fellow citizens think these securities necessary.

1 Annals of Congress 450 (1789) (statement of Rep. Madison).

Anti-Federalists were insistent upon preservation of trial by jury. Their primary concern was summarized by Eldridge Gerry, "who urged the necessity of Juries to guard agst. corrupt Judges." 2 Farrand, The Records of the Federal Convention of 1787 587 (1911). Indeed, the entire *raison d'être* for the jury trial was to guard against enactment of "obnoxious legislation" by a misguided government. Charles Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 665 (1973). To many Americans, to not incorporate the Sixth and Seventh Amendments into the Constitution would have been a deal-killer.

Petitioner cordially asks the Justices of this Court to answer a simple question: If you were an English subject, accustomed to the rights and privileges of an Englishman, and you knew for a fact that judges of the new government could write *ad hoc, ex post facto* laws which apply to you and only you, whereas

under Magna Carta, "no freeman shall be outlawed, that is, put out of the protection and benefit of the laws, but according to the law of the land," 1 Blackstone, *Commentaries* at 138, would you swear your allegiance to the King, or pledge your allegiance to the flag of the United States of America?

Abraham Lincoln summarizes the view: "no man is good enough to govern another man, without the other's consent." Abraham Lincoln, Speech (on the Kansas-Nebraska Act, Springfield, IL), Oct. 16, 1854. We have a document in hand [the Declaration of Independence] declaring our lack of consent. Prior to the Revolution, our Founding Fathers asked this direct question: If you would not willingly suffer absolute rule by another, by what right do you claim absolute rule over us?

CONCLUSION

This week, our nation mourns the loss of Christina Taylor Green – a precocious child, born in the shadow of the tragedy of 9/11. She saw our government through the eyes of a child, untainted by the putrid stench of corruption, indolence and sloth that permeates its very core.

In a touching eulogy, President Obama appealed to our better angels:

> I want us to live up to her expectations. I want our democracy to be as good as she imagined it. All of us—we should do everything we can to make sure this country lives up to our children's expectations.

Barack Obama, Speech (Tucson, AZ), Jan. 12, 2011.

America's caricature of a judicial system is so decrepit, to call ours kangaroo courts is to risk legal reprisal ... *from kangaroos*. Public officials commit crimes against humanity with absolute impunity and even brag about it, while the rest of us fear to even speak, cowed by the knowledge that the Bill of Rights won't be there when we need it most.

If change is to come, it must start here. Now. At One First Street. Either lead, follow, or get the hell out of the way.

As Justice Thomas incisively explained, it was the structure of the government, and the protections against abuse of magisterial authority embedded in the Constitution, that were intended to protect our liberty. As they pertain to this particular case, the citizen's right to have a claim heard by the highest court in the land, and to have the court issue a written decision that would not only be binding on him or her, but on every other American by virtue of the doctrine of *stare decisis*, is a palladium of individual liberty. As demonstrated beyond cavil by the facts

underlying this case, discretionary review pursuant to a writ of *certiorari* so undermines this structural protection as to collapse the Twin Towers of freedom and liberty.

It is the office of the judge to always "make such construction [of any law] as shall suppress the mischief, advance the remedy, and to suppress subtle invention and evasions for continuance of the mischief ... according to the true intent of the makers of the act." *Heydon's Case* [1584] 76 Eng. Rep. 637 (Exch.). The purpose of mandamus relief is to force the recalcitrant public servant to discharge the duties of his job. There is no reason why Justices of the United States Supreme Court should be exempt from the reach of 28 U.S.C. § 1361, and Congress did not carve out an exception for their benefit.

The existence of jurisdiction "creates an implication of duty to exercise it," *Mondou*, 223 U.S. at 58, and federal courts "are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends." *Hyde v. Stone*, 61 U.S. at 176. *Certiorari* is in derogation of the sworn duty that this Court owes every American. For this reason, this Court must GRANT review of this petition, with an eye toward eradicating this odious practice.

Respectfully submitted,

__/s/_____
Kenneth L. Smith
23636 Genesee Village Rd.
Golden, Colorado 80401
Tel: (303) 526-5451

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 8,983 words, excluding those parts of the document exempted by Supreme Court Rule 33.1(d), and that the text is set in the Century family (New Century Schoolbook).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January ___, 2011.

_/s/_____
Kenneth L. Smith, in propria persona

Exhibit 1

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5041

September Term 2009
1:09-cv-01926-JDB
Filed On: July 1, 2010

Kenneth L. Smith,
Appellant

v.

Clarence Thomas, Honorable, et al.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Sentelle, Chief Judge, and Rogers and Brown, Circuit Judges

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. See Fed. R. App. P 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the district court's orders filed January 21, 2010, and January 27, 2010, be affirmed. Appellant sought mandamus relief to compel the Justices of the United States Supreme Court to hear and decide all claims brought before the Court. The district court correctly determined it lacked jurisdiction to order the Supreme Court to take any action. See In re Marin, 956 F.2d 339, 340 (D.C. Cir. 1992) (per curiam). As for appellant's alternative request to declare the Bill of Rights "null and void," the district court properly held it lacked authority to render a declaratory judgment because there was no "case of actual controversy within its jurisdiction," 28 U.S.C. § 2201(a). See MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 126-27 (2007).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

Exhibit 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 09-1926 (JDB)

KENNETH SMITH,
Plaintiff,

v.
HON. CLARENCE THOMAS, in his official capacity as an Associate Justice of the United States Supreme Court, et al.,
Defendants.

ORDER

Before the Court is [6] defendants' motion to dismiss Mr. Smith's complaint. Mr. Smith seeks "a mandate from this Court requiring the Justices of the United States Supreme Court to hear all petitions brought to that body under a writ of error or in the alternative, a formal declaration that the Bill of Rights is null and void for want of meaningful enforcement." Compl. at p. 3. He also has filed an "Emergency Motion for Declaratory and Injunctive Relief", which seeks the same relief See Pl.'s Emergency Mot. for Declaratory and Injunctive Relief [Docket Entry 2].

The Court cannot grant the requested relief, however, because it lacks jurisdiction to compel official action by the Justices of the United States Supreme Court. "[I]t seems axiomatic that a lower court may not order the judges or officers of a higher court to take an action." *Panko v. Rodak*, 606 F.2d 168, 171 n.6 (7th Cir. 1979); accord *In re Marin*, 956 F.2d 339, 340 (D.C. Cir. 1992) (citing *Panko*). That the Court lacks jurisdiction to issue a writ of mandamus also disposes of Mr. Smith's request for declaratory relief. A declaratory judgment is available only "[i]n a case of actual controversy within its jurisdiction." 28 U.S.C. § 2201(a). The absence of jurisdiction here renders declaratory relief unavailable. Therefore, it is hereby

ORDERED that defendants' motion to dismiss is **GRANTED** and Mr. Smith's complaint is **DISMISSED**; and it is further

ORDERED that [2] Mr. Smith's emergency motion for declaratory and injunctive relief is **DENIED** as moot.

SO ORDERED.

/s/
JOHN D. BATES
United States District Judge

Dated: January 21, 2010

Supreme Court, U.S.
FILED
MAR 30 2011
OFFICE OF THE CLERK

(2)

No. 10-935

In The
Supreme Court of the United States

KENNETH L. SMITH,
Petitioner,

v.

HON. CLARENCE THOMAS, *et al.*,
Respondents,

On Petition For Rehearing

Kenneth L. Smith,
in propria persona
23636 Genesee Village Rd.
Golden, Colorado 80401
(303) 526-5451

QUESTION PRESENTED

In an official capacity action, where lower courts held that they "lacked jurisdiction to order the Supreme Court to take any action," in light of the public confession by a Justice of this Court that he had previously **sat in judgment of an official capacity action after he accepted an apparent bribe from an interested party**, does the Justices' refusal to consider an appeal on the basis of a presumed conflict of interest—without making any attempt to justify that decision in writing or establish binding precedent—violate a litigant's First Amendment right of access to the courts (specifically, by refusing to resolve a legitimate constitutional question properly presented to the courts), Fifth Amendment right to due process of law (including "the right to hear why" and to rely on precedent), and/or its equal protection component?

OTHER PARTIES TO THE PROCEEDING

The Respondents are initial defendants who participated in the appeal in the Court of Appeals for the District of Columbia: Chief Justice JOHN G. ROBERTS, JR, and Associate Justices CLARENCE THOMAS, ANTONIN G. SCALIA, ANTHONY M. KENNEDY, RUTH BADER GINSBURG, SAMUEL A. ALITO,, JR. STEPHEN G. BREYER, all of which **have been named** in this action **in their official capacities only**, thereby entitling them to hear this appeal. Justice JOHN PAUL STEVENS resigned from the bench during the pendency of this matter; accordingly, any action taken with respect to him would by definition be moot. As Justice Stevens' successor, Associate Justice ELENA KAGAN is joined in this appeal as a matter of statutory law.

TABLE OF CONTENTS

QUESTION PRESENTED

OTHER PARTIES TO THE PROCEEDING

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF THE CASE 7

PUBLIC POLICY CONSIDERATIONS DEMAND THAT THIS PETITION BE HEARD 8

ARGUMENT 11

I. The Roberts Paradox 13

II. The Scalia Gambit 14

III. The *Marbury* Repudiation 17

CONCLUSION 18

REQUIRED RULE 44 STATEMENT 22

EXHIBIT 24

TABLE OF AUTHORITIES

CASE	PAGE
Bush v. Gore, 531 U.S. 98 (2000)	10
Carey v. Piphus, 435 U.S. 247 (1978)	12
Cheney v. United States Ct. of App. for the District of Columbia, 541 U.S. 913 (2004)	*var.*
Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985)	12
Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992)	13
Ex parte McCardle, 74 U.S. 506 (1869)	11
Gore v. Harris, 773 So.2d 524 (Fla. 2000)	10
Marbury v. Madison, 5 U.S. 137 (1803)	11, 17
Microsoft Corp. v. United States, 530 U.S. 1301 (2000)	15
Moragne v. States Marine Lines, 398 U.S. 375 (1970)	12
New Jersey Democratic Party, Inc. v. Samson, No. A-24 Sept. Term 2002 (N.J. 2002)	10
Palm Beach County Canvassing Bd v. Harris, 772 So.2d 1220 (Fla. 2000)	10
People ex rel. Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003)	10
Poindexter v. Greenhow, 114 U.S. 303 (1884)	12
Reid v. Covert, 354 U.S. 1 (1957)	7, 13
Smith v. Mullarkey, 121 P.3d 890 (Colo. 2005) (per curiam), *cert. denied*, 547 U.S. 1067 (2006)	14
Tumey v. Ohio, 273 U.S. 510 (1927)	12

CASE PAGE

United States v. Bajakajian,
524 U.S. 321(1998) 11
United States v. Gorman,
807 F.2d 1299 (6th Cir. 1986) 14
United States v. Will, 449 U.S. 200 (1980) 17
United States v. Williams,
705 F.2d 603 (2d Cir. 1983) 14

STATUTES AND OTHER AUTHORITIES

Aaronson, Mark N., et al., Letter (to Sen. Patrick Leahy, et al.), Feb. 23, 2011 9
Aesop, *The Wolf and the Lamb* (~600 BCE) . . . 19
Bouvier, J., *A Law Dictionary* (15th ed. 1883) . 8
Denniston, Lyle, Roberts' Recusal Policy, SCOTUSblog, Sept. 30, 2005 15
Emergency Mot. for Recusal of Justice Thomas and/or to Suspend the Rule of Four, *Smith v. Thomas*, No. 10-935 (U.S. filed Feb. 16, 2011) 16
Evans, Will, Money Trails Lead to Bush Judges, *Salon.com*, Oct. 31, 2006 12
Hamill, Denis, Getting Judgeship A (50) Grand Thing, *N.Y. Daily News*, Oct. 25, 2005 12
Jefferson, Thomas, Letter (to Wilson Nicholas), Sept. 7, 1803 13
Lazarus, Edward, Scalia's Refusal to Recuse: Why His Lengthy Explanation Is Completely Unconvincing, And Why *Bush v.*

PAGE

Gore Provides Even More Reason to Recuse, *Findlaw*, Apr. 1, 2004 10
Marquis, Christopher, Contesting the Vote: Challenging a Justice, *N.Y. Times*, Dec. 12, 2000 16
Mauro, Tony, Justice Alito's Green Day, *Legal Times*, Feb. 6, 2006 15
Murphy, Christopher, *Murphy Unveils Legislation to Increase Transparency and Accountability at Supreme Court (press release)*, Mar. 1, 2011 9
N.H. Const., part I, art. 2-3 19
Neumann, Jr., Richard K., Conflicts of Interest in *Bush v. Gore*: Did Some Justices Vote Illegally?" *Geo. J. Legal Ethics* 34 (2003) . . . 16
Petition, *Smith v. Thomas*, No. 10-935 (U.S., filed Jan. 18, 2011) 11
Preamble, Bill of Rights (1791) 11
Rehnquist, William H., *et al.*, Statement of Recusal Policy of the Supreme Court of the United States, Nov. 1, 1993 15
Scalia, Antonin, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989) . . . 8
Senator: Kagan Should Sit Out Health Care Case, *USA Today*, Feb. 4, 2011 9
Stein, Sam, Kagan: In *Bush v. Gore*, Court Was Affected By Politics and Policy, *Huffington Post*, May 19, 2010 9

PAGE

Suetonius, *The Lives of the Twelve Caesars* (121 AD) 12
The Federalist No. 78 11
U.S. Const. amend. I ..... *passim.*
Weiner, Anthony D., Letter (to Justice Thomas) (undated) 9
28 U.S.C. § 1 ..... *passim.*
28 U.S.C. § 453 ..... *passim.*
28 U.S.C. § 1257 ..... *passim.*

DECISION CHALLENGED

A copy of the unpublished Order of the Court is included as an Exhibit with this Petition, at p. 24.

STATEMENT OF JURISDICTION

Jurisdiction exists pursuant to 28 U.S.C. §1254(1) and Supreme Court Rule 44. The Order in question issued on Mar. 7, 2011; this petition is considered as timely filed when mailed on or before Apr. 1, 2011.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

Article III, section 1, of the United States Constitution states, in pertinent part:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

The First Amendment to the United States Constitution states, in pertinent part:

> Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances.

The Fifth Amendment to the United States Constitution states, in pertinent part:

> No person shall ... be deprived of life, liberty, or property, without due process of law.

28 U.S.C. §2109 provides, in pertinent part:

> In any other case brought to the Supreme Court for review, which cannot be heard and determined because of the absence of a quorum of qualified justices, if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court.

STATEMENT OF THE CASE

Call it The Roberts Paradox. On March 7, 2011, this Court has achieved what no American court has ever before dared: **It held that the Constitution is no longer the paramount law of our land**. *Cf. Reid v. Covert*, 354 U.S. 1 (1957).

The lower courts in this case ruled that they did not have jurisdiction to even entertain the question of whether this Court's practice of *certiorari* review is constitutional. If they cannot decide it, and this Court cannot reach a quorum when the question is presented to it, then no one can challenge the practice. A statute impervious to constitutional challenge is above the Constitution, by definition.

This case arises from the bizarre *sua sponte* recusal of eight Justices, sued in their **official** capacities, in direct and irreconcilable conflict with centuries of precedent. For instance, Justice Scalia refused to recuse himself in a matter involving his friend Vice-President Cheney on the grounds that the petition before the Court was an "official capacity" lawsuit, observing that

> ...while friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, **it has traditionally NOT been a ground for recusal where official action is at issue, no matter how important the official action was to**

> **the ambitions or the reputation of the Government officer.**

Cheney v. United States Ct. of App. for the District of Columbia, 541 U.S. 913, 916 (2004) (Scalia, J., memo; hereinafter, "Scalia Memo at [page]").

No reason was offered for this astonishing break from precedent. As reason is the soul of law, 2 J. Bouvier, *A Law Dictionary* 209 (15th ed. 1883), and equal treatment, the soul of justice, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1178 (1989), such a profound repudiation of centuries of practice should at least have been explained in a manner reconcilable with the Constitution those Justices swore to uphold.

This, in turn, begs an obvious question: whether this inexplicable departure from precedent violates Petitioner's right to due process of law or its equal protection component and, by necessary implication, his First Amendment right of access to the courts and if so, whether these prudential concerns render 28 U.S.C. §§1 and 1257 unconstitutional.

PUBLIC POLICY CONSIDERATIONS DEMAND THAT THIS PETITION BE HEARD.

Even cursory examination of the news of the day reveals that the recusal practices of the Justices is a matter of considerable public importance. A group of Congresspersons led by Rep. Anthony Weiner (D-

NY) have implored Justice Thomas to recuse in any case questioning the constitutionality of Obamacare, Anthony D. Weiner, Letter (to Justice Thomas), not dated (copy on file), and Sen. Orrin Hatch (R-UT) is asking the same of Justice Kagan. Senator: Kagan Should Sit Out Health Care Case, *USA Today*, Feb. 4, 2011. Over one-hundred law professors recently wrote a joint letter imploring Congress to impose an ethics regime upon this Court, Mark N. Aaronson, et al., Letter (to Sen. Patrick Leahy, et al.), Feb. 23, 2011, and Rep. Chris Murphy (D-CT) has unveiled legislation aimed at doing that. Christopher Murphy, *Murphy Unveils Legislation to Increase Transparency and Accountability at Supreme Court (press release)*, Mar. 1, 2011 (copies on file). And of course, Rep. James Sensenbrenner (R-WI) and Sen. Charles Grassley (R-IA) have resurrected their plan to have an Inspector General oversee our courts.

This case comes before this Court at a time where public respect for our courts is at a historic low, and with compelling justification. When a Justice openly admits that you are little more than a band of black-robed dictators,[1] it tends to be corrosive to the rule of law. But more directly, our courts are no longer "judicial tribunals" but rather, mere proxies for the

---

[1] Justice Kagan used the euphemistic "Platonic Guardians"; "benevolent dictators" exist only in Aristotlean theory. Sam Stein, Kagan: In *Bush v. Gore*, Court Was Affected By Politics and Policy, *Huffington Post*, May 19, 2010.

two factions striving for control of our kleptocracy. Since *Bush v. Gore*, where virtually every judge's position was a direct function of which faction put him or her into office,[2] the veneer of *legal reasoning* has become comically transparent. As Edward Lazarus incisively observed:

> Remember *Bush v. Gore*? Scalia was the most vocal member of a narrow five-justice majority that not only handed Bush the presidency, but also handed Cheney the Vice-presidency. Worse still, the Court, including Scalia, committed this extraordinary act on the basis of a legal opinion that was so transparently devoid of logic and so contrary to the usual views of the justices who propounded the opinion, that it could be reasonably be viewed as an act of naked political partisanship.

Edward Lazarus, Scalia's Refusal to Recuse: Why His Lengthy Explanation Is Completely Unconvincing, And Why *Bush v. Gore* Provides Even More Reason to Recuse, *Findlaw*, Apr. 1, 2004.

---

[2] See, *Palm Beach County Canvassing Board v. Harris*, 772 So.2d 1220 (Fla. 2000); *Gore v. Harris*, 773 So.2d 524 (Fla. 2000); *Bush v. Gore*, 531 U.S. 98 (2000) (virtually perfect correlation); see also, *New Jersey Democratic Party, Inc. v. Samson*, No. A-24 Sept. Term 2002 (N.J. 2002); *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003) (same).

ARGUMENT

The central question posed to the Court in *Smith v. Thomas* was simple and straightforward:

> Can Congress (or this Court, acting *sua sponte*) impose restrictions upon the jurisdiction of Article III courts in such a way as to eviscerate the Bill of Rights?

"Questions Presented," Petition, *Smith v. Thomas*, No. 10-935 (U.S., filed Jan. 18, 2011).

Anyone who endured the first year of law school should recognize the problem as the one presaged by *Ex parte McCardle*, 74 U.S. 506 (1869): If Congress can limit the jurisdiction of our courts in such a way as to deprive the citizen of any legal remedy for the violation of a constitutional right, it necessarily has the power to eviscerate the Bill of Rights. *Cf., Marbury v. Madison*, 5 U.S. 137, 163 (1803). As the Bill of Rights was plainly intended to restrain Congress, Preamble, Bill of Rights (1791); *see*, The Federalist No. 78 (Alexander Hamilton), this Court is obliged to invalidate such a provision as unconstitutional. And by implication, any judicially-created practice having the same effect is unconstitutional, for much the same reason.

Over the years, this Court has consistently recognized that federal litigants have certain rights, such as that to "equality before the law," *United States v. Bajakajian*, 524 U.S. 321, 338 (1998), to procedural

due process, *Carey v. Piphus*, 435 U.S. 247 (1978), to have grievances heard by a fair and independent tribunal, *Tumey v. Ohio*, 273 U.S. 510, 523 (1927), and to rely on pronouncements of this and other courts as authoritative expositions of what "the law" is. *Moragne v. States Marine Lines*, 398 U.S. 375, 403 (1970). These rights are all "conferred, not by legislative grace, but by constitutional guarantee." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985) (internal quotation omitted). But if the courts can foreclose all remedies for their breach, these rights are extinguished. *Poindexter v. Greenhow*, 114 U.S. 270, 303 (1884).

Certiorari review deprives federal litigants of all of these rights, exposing them to the tender mercies of the talent-challenged political hacks of the lower courts, many of whom have "bought" their way onto the bench, either directly or indirectly.[3] Moreover, it deprives citizens of the ability to rely on the pronouncements of our courts as an authoritative statement of what "the law" is. Law not only becomes not known but *unknowable*, as it was during the reign of Emperor Caligula.[4]

---

[3] *See e.g.*, Will Evans, Money Trails Lead to Bush Judges, *Salon.com*, Oct. 31, 2006, at http://www.salon.com/news/feature/2006/10/31/money_trail;Denis Hamill, Getting Judgeship A (50) Grand Thing, *N.Y. Daily News*, Oct. 25, 2005, at 3.

[4] Suetonius, *The Lives of the Twelve Caesars* 280 (trans. A. Thomson; Bell, 1893), Ch. 4, § LXI (121) (Caligula published laws high on a wall, in small print, so no one could read them).

I. THE ROBERTS PARADOX

> Our peculiar security is in possession of a written constitution. Let us not make it a blank paper by construction. If [our public officials' powers are boundless] then we have no constitution. If it has bounds, they can be no other than the definition of the powers which that instrument gives.

Thomas Jefferson, Letter (to Wilson Nicholas), Sept. 7, 1803 at 2.

In choosing to recuse in this matter, the Roberts Court has declared that **no one can decide whether *certiorari* review is constitutional**. Congress (and this Court) can only act within the limitations of the Constitution ... but yet, no one can authoritatively ascertain just what those limitations are.

"The United States is entirely a creature of the Constitution. Its power and authority have no other source. **It can only act in accordance with all the limitations imposed by the Constitution**." *Reid v. Covert*, 354 U.S. at 5-6 (emphasis added). When that venerable document says that "Congress shall pass no law," the authors meant what they said and said what they meant. *See, Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (collecting cases). But if none have standing to challenge the constitutionality of laws enacted by Congress in the lower courts, and the Justices must recuse themselves, how can the powers of our Imperial Congress

ever be challenged?

II. THE SCALIA GAMBIT

Even Justice Scalia admits it: To not put too fine a spin on it, during the pendency of a case in which he was a party, **Vice-President Cheney handed the Scalia family** what was tantamount to **a five-figure bribe**.[5] *Scalia Memo* at 2. After all, most of us little people will never know the sybaritic pleasures of riding in a private jet, being unable to justify the extravagance. Scalia confesses his friendship with Cheney, and the trip was set "long before the Court granted certiorari" in the case. Id. at 2. All Cheney needed was four votes; he had one in the bank, and a formidable advocate on the Court.

In any civilized jurisdiction—in Colorado, your mileage will vary[6]—this fact scenario is grounds for mandatory recusal. But Justice Scalia invoked this Court's *de facto* Rule of Necessity, which provides:

---

[5] The value of a bribe is its value to the recipient. *E.g.*, *United States v. Gorman*, 807 F.2d 1299, 1305 (6th Cir. 1986);*United States v. Williams*, 705 F.2d 603 (2d Cir. 1983) (business loan). A medium-sized private jet costs ~$3-4,000 per hour, according to a survey of websites offering the service.

[6] *Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005) (per curiam), *cert. denied*, 547 U.S. 1067 (2006) (justices decided a case in which they were defendants in tort, despite the fact that non-conflicted judges were authorized by statute to hear it).

> Even one unnecessary recusal impairs the functioning of the Court. ... In this Court, where the absence of one Justice cannot be made up by another, **needless recusal deprives litigants of the nine Justices to which THEY ARE ENTITLED**, produces the possibility of an even division on the merits of the case, and has a distorting effect upon the certiorari process, requiring the petitioner to obtain (under our current practice) four votes out of eight instead of four out of nine.

William H. Rehnquist, *et al.*, Statement of Recusal Policy of the Supreme Court of the United States, Nov. 1, 1993, at 1-2 (emphasis added).

According to a quorum of this Court,[7] a citizen's right to have his case heard by an unimpaired Court is so important that a Justice can still hear a case if he takes an apparent bribe from a litigant who *just happens* to be a personal friend. *Cheney, supra; see also, Microsoft Corp. v. United States*, 530 U.S. 1301 (2000) (CJ Rehnquist's son as counsel).

Justice Scalia further distances himself from Mr. Cheney by declaring that the lawsuit was an official capacity case, asserting that "it has traditionally not been a ground for recusal where official action is at

---

[7]Six active Justices have publicly endorsed the Statement, Id; Lyle Denniston, Roberts' Recusal Policy, *SCOTUSblog*, Sept. 30, 2005; Tony Mauro, Justice Alito's Green Day, *Legal Times*, Feb. 6, 2006.

issue, **no matter how important the official action was to the ambitions** or the reputation **of the Government officer**." Scalia Memo at 4 (emphasis supplied). By this metric, given the paramount importance of citizen access to this Court—even excusing a five-figure bribe—it logically follows that a Justice should never recuse in an official capacity action.

But yet, Justice Scalia did precisely that!

Justices of this Court have been known to cast a deciding vote in cases affecting their personal interests, corporate patrons, and friends, bending the law for their benefit.[8] Even where it appeared to all the world that **wife Ginni accepted a bribe** on behalf of Justice Thomas' family, he cast the deciding vote in the recent *Citizens United* case.[9] But Justices have always rationalized these abuses of office under the rationale that these were "official capacity" actions,

---

[8] *See*, Christopher Marquis, Contesting the Vote: Challenging a Justice, *N.Y. Times*, Dec. 12, 2000, at 26 (Thomas handed the 2000 Presidential election to Bush in *Bush v. Gore*, while his wife vetted possible Bush Administration staffers); Richard K. Neumann, Jr., *Conflicts of Interest in Bush v. Gore: Did Some Justices Vote Illegally?*" Geo. J. Legal Ethics 34 (2003) (citing multiple, uncontested sources indicating that Justice O'Connor wanted to retire, but didn't want to be replaced by a Democrat appointee).

[9] *See*, Emergency Mot. for Recusal of Justice Thomas and/or to Suspend the Rule of Four, *Smith v. Thomas*, No. 10-935 (U.S. filed Feb. 16, 2011), presenting the case in detail.

implicating the ancient proposition that it was better for a conflicted judge to hear a case than for it to not be heard at all. *See, United States v. Will*, 449 U.S. 200, 213-16 (1980), and cases collected therein. Now, all of a sudden, in an official capacity lawsuit threatening the enormous power and prerogatives of this Imperial Court, eight Justices pulled a 180° quicker than Linda Blair in *The Exorcist*....

You can't make this stuff up.

III. THE *MARBURY* REPUDIATION

What this Court leaves unanswered in the wake of the Justices' mass recusal is why the ancient Rule of Necessity does not apply to this situation. When the question of judicial salaries was on the line, this Court had no difficulty in finding that the Rule was not superseded by 28 U.S.C. § 455, on the grounds that the public "might be denied resolution of this crucial matter if first the District Judge, and now all the Justices of this Court, were to ignore the mandate of the Rule of Necessity and decline to answer the questions presented." *Id. at 217.* But now, in an equally crucial case questioning the power and prerogatives of this Imperial Court, Congress suddenly has the power to "foreclose federal courts from exercising 'the province and duty of the judicial department to say what the law is.'" *Id.* (quoting *Marbury*, 5 U.S. at 177). *To state the case is to refute it.*

CONCLUSION

The difference between a judge and a dictator is that whereas a judge is obliged to explain decisions with reference to pre-existing law, dictators merely issue ukases without comment. On that score, Chief Justice Roberts may now take his well-earned place among his new peers.

WOLF, meeting with a Lamb astray from the fold, resolved not to lay violent hands on him, but to find some plea to justify to the Lamb the Wolf's right to eat him. He thus addressed him: "Sirrah, last year you grossly insulted me." "Indeed," bleated the Lamb in a mournful tone of voice, "I was not then born." Then said the Wolf, "You feed in my pasture." "No, good sir," replied the Lamb, "I have not yet tasted grass." Again said the Wolf, "You drink of my well." "No," exclaimed the Lamb, "I never yet drank water, for as yet my mother's milk is both food and drink to me." Upon which the Wolf seized him and ate him up,

BEST AVAILABLE COPY

saying, "Well! I won't remain supperless, even though you refute every one of my imputations."

The tyrant will always find a pretext for his tyranny.

Aesop, *The Wolf and the Lamb* (~600 B.C.) (emphasis added).

The Wolf is the Supreme Court, accustomed to ravishing citizens' rights. But when a citizen raises an unassailable objection to its practices, **the Court runs home to Mommy like a spooked child**, whimpering under her skirt? "B-B-But Congress wrote a law," the Justices whine, "and we have to follow it!" Remember, this is the same Court claiming a *constitutional mandate* to invalidate laws *written by* Congress....

Even *Gadhafi* wouldn't make this stuff up.

You don't need to be an Einstein to figure out that in this unprecedented recusal decision, the Justices placed their fingers on the scales of justice to benefit themselves. *Certiorari* review cannot be defended, as it deprives the citizen of equal justice under law, voiding the Constitution by depriving citizens of the benefit of their bargain. *N.H. Const.*, part I, art. 2-3. And, were it found unconstitutional, the Justices would be forced to spend 99% of their time fixing the endless stream of self-evident errors committed by

our corrupt lower courts. The size of the Court could increase ten-fold, which means that no one will offer seven-figure advances for their autobiographies, or invite them to rub elbows with the Queen.

This decision really *is* all about them.

The mass decision to recuse in *Smith v. Thomas* is an embarrassment to this Court, which should (under Supreme Court Rule 44) be reconsidered—or at least, *explained*.

Respectfully submitted,

__/s/_____
Kenneth L. Smith
23636 Genesee Village Rd.
Golden, Colorado 80401
Tel: (303) 526-5451

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 2,951 words, excluding those parts of the document exempted by Supreme Court Rule 33.1(d), and that the text is set in the Century family (New Century Schoolbook).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 30, 2011.

_/s/_ _____
Kenneth L. Smith, in propria persona

REQUIRED RULE 44 STATEMENT

The Justices' mass recusal in this, an *OFFICIAL CAPACITY* action, is a repudiation of five centuries of precedent. *See United States v. Will*, 449 U.S. 200 (1980). More importantly, it creates a constitutional solecism: A statute which is impervious to constitutional challenge is, by definition, above the Constitution; **accordingly, the Constitution is no longer the paramount law of our land**. *Cf. Reid v. Covert*, 354 U.S. 1 (1957). This bizarre state of affairs precipitates the following constitutional question:

> In an official capacity action, where lower courts held that they "lacked jurisdiction to order the Supreme Court to take any action," in light of the public confession by a Justice of this Court that he had previously **sat in judgment of an official capacity action after he accepted an apparent bribe from an interested party**, does the Justices' refusal to consider an appeal on the basis of a presumed conflict of interest—without making any attempt to justify that decision in writing or establish binding precedent—violate a litigant's First Amendment right of access to the courts (specifically, by refusing to resolve a legitimate constitutional question properly presented to the courts), Fifth Amendment right to due process of law (including "the right to hear why" and to rely on precedent), and/or its equal protection component?

Traditionally, the "Rule of Necessity" has always provided a workable solution to this problem, but for some reason that this Court neglected to explain, it was not invoked here.

As the history of this case establishes, no lower court would accept jurisdiction over such a question. As there is no recognized provision empowering a citizen to prosecute an original action in this Court, the only conceivable way a remedy can be secured is through a petition for rehearing. For this reason, Petitioner hereby certifies and warrants that this Petition is being presented in good faith, and not for purpose of delay.

/s/ _____
Kenneth L. Smith

Exhibit 1

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

March 7, 2011

Mr. Kenneth Smith
23636 Genesee Village Road
Golden, CO 80401

Re: Kenneth L. Smith
v. Clarence Thomas, Associate Justice,
Supreme Court of the United States, et al.
No. 10-935

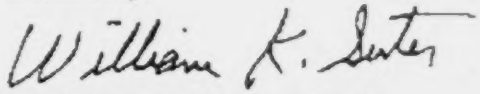
Dear Mr. Smith:

The Court today entered the following order in the above-entitled case:

Because the court lacks a quorum, 28 U.S.C. §1, and since the only qualified Justice is of the opinion that the case cannot be heard and determined at the next Term of Court, the judgment is affirmed under 28 U.S.C. §2109, which provides that under the cir-

cumstances "the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court." The Chief Justice, Justice Scalia, Justice Kennedy, Justice Thomas, Justice Ginsburg, Justice Breyer, and Justice Sotomayor took no part in the consideration or decision of this position.

Sincerely,



William K. Suter, Clerk